FILED
APR 25 1928
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM—1927

NO. 98

LASH'S PRODUCTS COMPANY (A CORPORATION),
PETITIONER,
vs.
THE UNITED STATES

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A. R. SERVEN,
Counsel.

DANIEL R. FORBES,
RICHARD D. DANIELS,
Of Counsel.

PRESS OF FRANK H. SHORT, 900 15TH STREET NORTHWEST

INDEX

	PAGE
Opinion below not yet officially reported	1
Date of judgment	1
Motion for new trial denied	1
Petitioner's contention below	1
Jurisdiction	2
Statement of case	2-3
Errors below	5
Argument—	
Preliminary	6
Right to pass sales tax on	6
Reasons for granting writ	7
1. Questions involved of great importance	7
2. Conflicting opinions of lower courts	8
3. Many similar cases pending	10
4. In public interest as questions involved not previously considered by this court	11
5. Effect of Treasury Regulation illegally increases petitioner's tax rate from 10 to 11 per cent	12
6. *Ad valorem* taxpayers affected by this case	13
7. Treasury Regulation arbitrary and unreasonable and not authorized by statute	13
Statutes and Regulations—	
Chap. 229, Sec. 3 (b) (App. February 13, 1925)	2
Revenue Act of 1918, Sections 628, 629	3-4
Revenue Act of 1918, Section 1312	6
Treasury Regulations 52, Art. 8	5

TABLE OF CASES

PAGE

American Express Co. v. Michigan, 177 U. S. 404 6
Clicquot Club Co. v. U. S., 13 Fed. (2nd) 655 8-9-11
Elmer Candy Co. v. Fauntleroy, 19 Fed. (2nd) 664 8-9
Elmer Candy Co. v. Fauntleroy, 24 Fed. (2nd) 95, Adv. Op. 9-11
Fields v. United States, 205 U. S. 292 2
Forsyth v. Hammond, 166 U. S. 506 2
Gould v. Gould, 245 U. S. 151 14
Hamilton Brown Shoe Co. v. Wolf Bros. Co., 240 U. S. 251 2
Magnum Import Co. v. Coty, 262 U. S. 159 2
Morrill v. Jones, 106 U. S. 466 14
United States v. Merriam, 263 U. S. 187 14
White Rock Mineral Springs Co. v. Edwards, 23 Fed. (2nd) 539, Adv. Op. 8-10

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1927

No. 858

LASH'S PRODUCTS COMPANY (A CORPORATION),
PETITIONER,
vs.
THE UNITED STATES

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This case arises under the Revenue Act of 1918. (R. p. 13; Finding IV.)

The opinion of the Court of Claims in this case has not yet been officially reported.

The date of the judgment in this case is November 7, 1927. (R. p. 16-17.)

Petitioner's motion for new trial was overruled on January 23, 1928. (R. p. 17.)

Petitioner claimed in the Court below that it was required by law to pay the beverage tax on only 10/11ths of the amounts it received from its customers, which included the price of its products and also the 10 per centum beverage tax thereon, while the Court below held that it was required to pay the 10 per centum beverage tax upon the entire amount received by it from its customers. (R. p. 7-8; Section VII.

Amended Petition; Opinion of Court, R. p. 16, Second Paragraph.)

The jurisdiction is invoked under Chapter 229, Section 3 (b) of "An Act to Amend the Judicial Code and to further define the jurisdiction of the Circuit Courts of Appeals and of the Supreme Court, and for other purposes," approved February 13, 1925. (43 Stat. L. 939.)

Attention is invited to the following cases, under which it is believed the writ prayed for should be granted:

Forsyth v. *Hammond* (166 U. S. 506; 41 L. ed. 1095);

Fields v. *United States* (205 U. S. 292; 51 L. ed. 807);

Hamilton Brown Shoe Co. v. *Wolf Bros. Co.* (240 U. S. 251; 60 L. ed. 629);

Magnum Import Company v. *Coty* (262 U. S. 159; 67 L. ed. 922).

STATEMENT OF THE CASE

Prior to 1919, Petitioner was engaged in the manufacture of cordials, syrups, and laxative medicinal preparations. (R. p. 12, Finding I.)

In June, 1919, it began the manufacture and sale of soft drink products, which were sold direct by its salesmen, who called upon its customers and told them that the price quoted for these soft drinks included the sales tax of 10 per centum, which petitioner was required by statute to report and pay. Petitioner also notified its customers by letter, under date of June 28, 1919, to the same effect. (R. p. 12-13; Finding III.)

During the period involved in this case, petitioner received $2,475,031.44 from its soft drink sales at the prices quoted therefor, which included the tax, and reported said sales and paid the 10 per centum beverage tax thereon under the Revenue Act of 1918 of $247,503.16. (R. p. 12-13, Findings III, IV.) These soft drinks were invoiced or billed to the customer without separate itemization or indication of the price of the goods and the sales tax thereon. (R. p. 13, Finding IV.)

Petitioner duly filed refunding claims with the Commissioner of Internal Revenue for $22,500.33, claimed to have been erroneously computed and overpaid by it as beverage tax on said sales, which claims were disallowed by said Commissioner on the ground that petitioner "did not indicate the tax in such a way as not to be a part of and included in the price," for which the product was sold. (R. p. 14, Finding V.) Thereafter, petitioner brought suit in the Court of Claims for said amount, on the ground that it had paid a 10 per centum beverage tax on the entire amount received from its customers for soft drinks, which included the said 10 per centum sales tax, instead of on the actual price it received for the soft drinks "so sold." (R. p. 7-8, Section VII, Amended Petition.)

THE LAW

The provisions of the revenue laws involved in the case are Sections 628 and 629 of the 1918 Revenue Act (40 Stat. L. 1116), which are as follows:

> Sec. 628. That there shall be levied, assessed, collected, and paid in lieu of the taxes imposed by

sections 313 and 315 of the Revenue Act of 1917—

(a) Upon all beverages derived wholly or in part from cereals or substitutes therefor, and containing less than one-half of one per centum of alcohol, sold by the manufacturer, producer, or importer, in bottles or other closed containers, a tax equivalent to 15 per centum of the price for which so sold; and upon all unfermented grape juice, ginger ale, root beer, sarsaparilla, pop, artificial mineral waters (carbonated or not carbonated), other carbonated waters or beverages, and other soft drinks, sold by the manufacturer, producer, or importer, in bottles or other closed containers, a tax equivalent to 10 per centum of the price for which so sold; and

(b) Upon all natural mineral waters or table waters, sold by the producer, bottler, or importer thereof, in bottles or other closed containers, at over 10 cents per gallon, a tax of 2 cents per gallon.

SEC. 629. That each manufacturer, producer, bottler, or importer of any of the articles enumerated in section 628 shall make monthly returns under oath in duplicate and pay the taxes imposed in respect to such articles by such section to the collector for the district in which is located the principal place of business, containing such information necessary for the assessment of the tax, and at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulation prescribe.

The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due.

THE TREASURY REGULATIONS

Treasury Regulations 52 related to the sales tax on soft drinks and other beverages under the 1918 Revenue Act. Article 8 of said Regulations, which was in effect during the period here in question, was as follows:

> Art 8. *Basis for tax; sale price.*—The tax is on the sale by the manufacturer of the beverage. It is measured by the price for which the beverage is sold. It is on the actual sales price of the beverage sold and not on the list price where that differs from the sales price. If the sales price of a taxable beverage is increased to cover the tax, the tax is on such increased sales price, but where the tax is billed as a separate item it is not to be considered as an increase in the sale price. The tax is payable in respect to a sale made whether or not the purchase price is actually collected.

ERRORS OF THE COURT BELOW

The Court below erred in holding as follows:

1. That, within the meaning of the provisions of Sections 628 and 629, and in view of the provisions of Section 1312, of the 1918 Revenue Act, the petitioner's selling price upon which the sales tax was to be computed was the gross amount it received from its customers, which included the tax, instead of its true selling price, which was the part thereof petitioner was to retain as its own after paying the tax so included.

2. That, where petitioner's customers purchased its products with the understanding that the amount paid for them included the sales tax thereon, it was legally necessary that the invoice for the goods so purchased

should separately show or indicate both the amount petitioner was to receive for the goods and the tax thereon, in order that petitioner might pay the tax on the amount actually received for its goods, instead of on the total amount it received from its customers.

3. That the sales tax was due and payable upon the entire amount petitioner received from its customers in connection with its sale of soft drinks to them.

4. That, where the petitioner sold soft drinks for an amount which included both the price for the goods and the sales tax thereon, and the purchaser so understood, the Commissioner of Internal Revenue can, by regulation, deprive petitioner of its right to show the true price for which its goods were sold and thereby increase the statutory rate of sales tax from 10 to 11 per centum of the price it actually received for its soft drinks, because petitioner's invoices or bills did not separately itemize or indicate both the price of the goods so sold and the amount of the sales tax thereon.

ARGUMENT

The petitioner here endeavored to pass the sales tax on to the customers by informing them that the price for which its soft drink products could be purchased included the 10 per centum sales tax thereon, and its customers purchased its soft drinks with that understanding. That petitioner had the right to pass the tax on to its customers is supported by American Express Company v. Michigan (177 U. S. 404; 44 L. ed. 823). Section 1312 of the 1918 Revenue Act seems also to recognize petitioner's right to do so. Petitioner did not separately itemize in its invoices or bills the price of the soft drinks and the tax thereon.

Finding III (R. p. 12) shows that petitioner began the manufacture and sale of soft drink products in June, 1919. The Court below appears to have overlooked this fact, as the second sentence of its opinion (R. p. 15) is as follows:

> "Sales were made to the retail trade, who were informed by the salesmen that the price of plaintiff's product would not be increased on account of the beverage tax imposed by the revenue act of 1918, but that the price would remain the same as before the act was passed."

The revenue act of 1918 was approved February 24, 1919. As petitioner did not begin the manufacture and sale of its soft drinks until June, 1919, the Court below was in error in its understanding that the price of petitioner's soft drinks "would remain the same as before the act was passed." Evidently, this misapprehension and the effort of the Regulation (quoted above) to prevent petitioner from passing the sales tax on to the customer unless "the tax is billed as a separate item," persuaded the lower Court that the Commissioner of Internal Revenue had power to limit the evidence of purchaser's agreement to pay the tax to the statements in the invoices therefor, regardless of the terms under which the goods were sold.

CERTIORARI SHOULD BE GRANTED

Petitioner submits this writ should be granted for the following reasons:

1. The questions involved are important, effecting the revenues of the government and are, therefore, of public interest and general importance.

The questions here involved relate to the proper administration of the sales tax on soft drinks, under the provisions of the revenue act of 1918, and apply equally to all of the various *ad valorem* sales taxes under the 1918 and subsequent revenue acts. They are, therefore, of great public interest and importance to the Government, the citizens, and the individual taxpayers. A very substantial portion of the government revenues is derived from the *ad valorem* sales taxes.

The Court may therefore very properly grant the writ in this case.

2. At the time the case at bar was presented to the Court below, the basic question here involved had been decided in favor of petitioner's contention by the District Court in *Cliequot Club Company* v. *United States* (13 Fed (2nd) 655), which was not appealed, and adversely to petitioner's contention by the District Court in *Elmer Candy Company, Inc.* v. *Fauntleroy* (19 Fed. (2nd) 664). Since the decision of the lower court herein, this question has been decided adversely to petitioner's contention by the District Court in *White Rock Mineral Springs Company* v. *Edwards* (23 Fed. (2nd) 539), and later in favor of petitioner's contention by the Circuit Court of Appeals in *Elmer Candy Company, Inc.* v. *Fauntleroy*, decided February 2, 1928, not yet reported, which reversed the decision of the District Court referred to above in that case. The net result of the interpretation of the law herein by the Courts to date show a Circuit Court of Appeals differing with the Court of Claims, and one District Court disagreeing with another.

There is a lack of uniformity in the decisions of the District Courts, a Circuit Court of Appeals, and the Court of Claims.

Perhaps the most important reason for granting to this Court authority to issue writs of certiorari is for the purpose of securing uniformity of decision in the construction and application of federal statutes. At the time the lower Court entered its judgment dismissing petitioner's case, two Federal District Courts had decided cases involving regulations containing identical provisions as to the evidence on which taxpayers could pass on to their customers the *ad valorem* taxes laid by the revenue act of 1918. The first was *Cliequot Club Company* v. *United States* (13 Fed. (2nd) 655), where the law and regulations involved in this case were under investigation. In a well considered opinion, the Court discussed the various questions entering into the case, including the Commissioner's interpretation of Article 8 of said Regulations (O. D. 28; St. 1-21-124, appearing in Sales Tax Rulings Bulletin No. S.T.1-21 for January, 1921), and held that the price of plaintiff's goods so sold was the amount it received for its soft drinks, exclusive of the amount it received on account of the 10 per centum tax thereon, and gave judgment for the plaintiff. No appeal was taken in this case. The second case arose under the provisions of Section 900, subsection (9) of the 1918 revenue act, which laid a 5 per centum tax on the price for which candy was sold, and there, as here, there was a Treasury Regulation prescribing an identical method by which the plaintiff could pass on the sales tax on candy to the purchaser. (*Elmer Candy Company, Inc.* v. *Fauntleroy, supra*). This case was appealed and since the Court of Claims decided the case at bar the Court of Appeals in a careful and exhaustive opinion discussed the various questions in the case and reversed the decision of the District Court (*Elmer Candy*

Company, Inc. v. *Fauntleroy* (24 Fed. (2nd) 95, Adv. Op.)

Since the decision of the case at bar by the lower Court, the Federal District Court dismissed the petition in *White Rock Mineral Springs Company* v. *Edwards* (23 Fed. (2nd) 539, Adv. Op.), involving the identical questions in the instant case, evidently following the opinion of the Court below herein.

It is therefore of great importance that the opinion of this Court be had, in order to insure uniformity of decision on the points here involved.

The Court may, therefore, very properly grant the writ in this case.

> 3. Many similar cases are pending in the courts, and it has been stipulated that forty-nine of such cases now pending in the Court of Claims shall be decided in accordance with the final disposition of the case at bar.

When the Court below convened at the beginning of its present term, the Chief Justice commented on the large number of beverage tax cases pending in that court, and suggested that a serious effort should be made to stipulate that as many as possible of these cases should be determined by a test case. In view of this suggestion, one attorney, according to his brief *amicus curiae*, filed in the Court below in connection with the case at bar, stipulated that forty-nine of his beverage tax cases in that court should abide by the final decision herein. It is also understood that several other beverage tax cases not so stipulated are pending in the court below and others in the local Federal courts.

Under these circumstances, it would appear that the

questions here involved are of grave public importance and should be determined by the decision of the Court of last resort.

The Court may, therefore, very properly grant the writ in this case.

4. It is in the public interest to have the questions here involved decided by the Court of last resort.

This Court has not heretofore had occasion to construe and apply the provisions of Sections 628 and 629 of the revenue act of 1918 (above quoted), or determine whether under those provisions the Commissioner of Internal Revenue has the right to limit petitioner's proof of the method by which it passed the beverage tax on to the customer to the mere form of its invoices therefor. As held in *Clicquot Club Company* v. *United States* (13 Fed. (2nd) 655; not appealed), the Commissioner's Regulation (Article 8, quoted above), attempts to limit this proof to form rather than substance, and the Court below seems to have fallen into the same error. In *Elmer Candy Company, Inc.* v. *Fauntleroy* (24 Fed. (2nd) 96, Adv. Op.), which involved an identical regulation concerning the effect of the contents of the invoice covering goods sold, the Court of Appeals reversed a decision of the District Court (19 Fed. (2nd) 664), and in discussing that regulation said:

"Apparently the only thing that could prevent a recovery in this case is the technicality regarding the manner of rendering invoices. We think what was done by plaintiff in notifying its customers that the price would include the tax comes within the meaning and intent of clause B above

> quoted, and that, plaintiff having in effect stated to the purchasers in quoting prices what portion represented the prices charged for the article and what portion represented the tax, the technicality should be disregarded."

The Court may, therefore, very properly grant the writ in this case.

> 5. The customer bought the goods with the understanding that the tax was included in the price he paid the company. If the company is required to pay a tax on the amount of tax so paid to it by the customer the legal tax rate of 10 per centum is thereby increased to 11 per centum on the price for which the goods were sold, for which there is no authority in the statutes.

When it is remembered that the petitioner received from its customers not only the actual price for which its soft drinks were sold, but also an additional 10 per centum thereof with which to pay the 10 per centum beverage tax thereon, it will be observed that if petitioner is required to pay a beverage tax of 10 per centum of the entire amount so received by it from its customers in connection with its sale of soft drinks to them it will be required to pay a beverage tax of 11 per centum upon the real or true price it received from its customers for its soft drinks sold to them. Nowhere in the 1918 revenue act is there any authority, either direct or indirect, for the imposition of a beverage tax at the rate of 11 per centum of the price for which its soft drinks were "so sold."

As the final decision in this case will control so many similar cases involving the identical questions in this case, it is respectfully submitted that the case at bar

is of such grave importance as to fully justify the granting of certiorari as prayed for.

The Court may, therefore, very properly grant the writ in this case.

6. Petitioner by its salesmen informed its customers that the price quoted for its soft drink products and for which it sold such products to them included the sales tax, which the statute required it to pay.

If the facts found by the lower court in this case are not sufficient to enable petitioner to pass the 10 per centum beverage tax on to its customers, then it would appear that a most serious injustice will be done to petitioner and many other taxpayers subject to *ad valorem* sales taxes under the 1918 and subsequent revenue acts, and for this reason the questions here involved are of such great public importance as to fully justify the granting of certiorari for the review of this case by the highest Court of the land.

The Court may, therefore, very properly grant the writ in this case.

7. The Commissioner of Internal Revenue was without legal authority to require petitioner to set up or indicate in its invoices or bills the price of its goods in one item and the amount of the sales tax thereon in another item, in order for petitioner to avoid being required to pay the sales tax on both the price for which it sold its products and also on the sales tax thereon so paid by the customer.

Nowhere in the revenue act of 1918 is there contained any authority, either direct or indirect, empowering the Commissioner of Internal Revenue to

prescribe the method by which petitioner must pass the beverage tax on its soft drink products on to its customers, or limit the evidence to prove that it had done so. When the Commissioner by regulation attempts to prescribe one solitary method of accomplishing this, to be established by evidence of one single act by petitioner, it is respectfully submitted that such a regulation is arbitrary and unreasonable and repugnant to the principles of fair and just treatment by the government of its citizens.

Furthermore, this Court said in Morrill v. Jones (106 U. S. 466, 467; 27 L. ed. 267):

> "The Secretary of the Treasury cannot, by his regulations, alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted."

If the Secretary of the Treasury cannot "alter or amend a revenue law," certainly no other official of the Treasury Department can do so. Neither can the provision of a revenue law be extended by implication or by a regulation based on implication. In *United States* v. *Merriam* (263 U. S. 187, 8; 68 L. ed. 244), this Court said:

> "On behalf of the government it is urged that taxation is a practical matter, and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. *Gould* v. *Gould*, 245 U. S. 151, 62 L. ed. 211, 213, 38 Sup. Ct. Rep. 53."

In view of the great public importance of the attempt by the Commissioner of Internal Revenue to assume the authority exercised by him in Article 8 of his said Regulations (*supra*), in regard to the method and character of proof necessary for petitioner to pass the beverage tax on its soft drinks on to the purchasers thereof, it is respectfully submitted that the decision of the lower Court herein should be reviewed by this Court and certiorari granted herein as prayed.

CONCLUSION

In view of all of the foregoing, it is respectfully submitted that the case at bar is one in which this Honorable Court may with great propriety grant a writ of certiorari, and it is respectfully so urged to do.

LASH'S PRODUCTS COMPANY,

By A. R. SERVEN,
Counsel.

DANIEL R. FORBES,
RICHARD D. DANIELS,
Of Counsel.